Supreme Court, U.S.
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No. 87-170

In The
Supreme Court of the United States
October Term, 1987

—o—

WILLIAM COPLEY, *et al.*,
Appellants,
v.
HEIL-QUAKER CORP., *et al.*,
Appellees.

—o—

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

MOTION TO AFFIRM

—o—

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, by withholding the benefit of the statute of limitations from corporations which are not licensed to do business in Ohio, the Ohio "Saving clause," § 2305.15, Ohio Revised Code, violates the Commerce Clause as applied to Heil-Quaker Corporation, which has no intrastate contacts with Ohio and which manufactured in Tennessee and shipped in interstate commerce a product which allegedly caused an injury in Ohio.

2. Whether the Court of Appeals abused its discretion by refusing to entertain the argument, which was first raised before it in a reply brief and which had not been raised before the District Court at all, that the declaration of unconstitutionality of § 2305.15 as applied should have been made operative only prospectively; and, even if it did, whether the lower courts had any choice but to decide this case by applying the constitutional holding which the District Court rendered in this case and which the Court of Appeals affirmed.

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WILLIAM COPLEY, *et al.*,

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v.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MOTION TO AFFIRM

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Appellee Heil-Quaker Corporation[1] ("Heil-Quaker") moves to affirm the judgment dismissing appellants' claim

1. Heil-Quaker Corporation is a wholly owned subsidiary of Inter-City Gas Corp.

against it on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The unpublished memorandum decision of the Court of Appeals in this case was not bound with the Jurisdictional Statement served on Heil-Quaker and is therefore reproduced in full commencing at page SA 1 of the Supplemental Appendix bound with this motion. It does not, however, contain the Court's reasoning on the questions raised by this appeal but simply refers to the court's decision in *Bendix Autolite Corporation v. Midwesco Enterprises, Inc.*, No. 85-3784, now reported at 820 F.2d 186 (6th Cir. 1987), with which this case had been consolidated for argument and which was decided by the same panel of the Court of Appeals.

JURISDICTION

Appellants are natural persons, citizens of Ohio, and were plaintiffs in the District Court. They sued for injuries allegedly sustained as a result of a furnace explosion in their home. The defendants in the District Court were Heil-Quaker, a Delaware corporation headquartered in Tennessee, Sears, Roebuck and Co., a New York corporation headquartered in Illinois, and Honeywell, Inc., a Delaware corporation headquartered in Minnesota. The Dis-

trict Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332.

On March 8, 1984, the District Court granted motions for summary judgment of Heil-Quaker and Sears, but did not then dispose of appellants' claim against the third defendant, Honeywell, and did not certify its decision in favor of Heil-Quaker as final pursuant to Rule 54(b), Fed. R. Civ. P. On March 25, 1986, the District Court entered summary judgment dismissing appellants' claim against the remaining defendant, Honeywell, and dismissed as moot Honeywell's third party complaints against Sears, Frey & Sons and Phillips Bottled Gas Company, thus disposing of all pending claims. Appellants appealed from the dismissal of their claims against Heil-Quaker and Honeywell.

The Court of Appeals affirmed the District Court's judgment dismissing appellants' claim against Heil-Quaker on the ground that it is barred by limitations, sustaining the District Court's holding that the Ohio tolling statute on which appellants sought to rely violates the Commerce Clause of the Constitution of the United States as applied to Heil-Quaker. The Court of Appeals' decision was rendered on May 20, 1987, and appellants' notice of appeal to this Court was filed on June 4, 1987. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1254(2).

———o———

COUNTERSTATEMENT OF THE CASE

Appellants filed their action against Heil-Quaker on August 24, 1982 in the United States District Court for

the Northern District of Ohio. They sought recovery for personal injuries allegedly inflicted on December 12, 1975, over six years before the complaint was filed, by an explosion of a furnace made by Heil-Quaker, allegedly caused by a malfunctioning valve which had been manufactured by defendant Honeywell. They alleged that they had purchased the furnace from Sears, the third defendant, and installed it in their home fifteen years in the past.

Heil-Quaker moved to dismiss on the ground that the claim against it is barred by Ohio's two year statute of limitations for actions for bodily injury, § 2305.10, Ohio Revised Code. Appellants did not dispute the applicability of the two year statute of limitations to their claim against Heil-Quaker, nor did they contend that their action had been brought within that time. However, since Heil-Quaker is not amenable to personal service *within* Ohio, appellants argued that their claim against it is preserved by Ohio's "Saving clause," § 2305.15, Ohio Revised Code:

> When a cause of action accrues against a person, if he is out of state . . . the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, of the Revised Code, does not begin to run until he comes into the state . . . .

This statute has been construed to toll the running of limitations so long as personal service upon the defendant cannot be made physically within the state, even when "long-arm" service is readily available as it was in this case.[2] *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971).

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2. Appellants directed their complaint against Heil-Quaker to its registered agent in Delaware, the state in which it is incorporated.

Heil-Quaker established by an uncontroverted affidavit that it has no intrastate contacts with Ohio, and appellants concede at page 3 of their Jurisdictional Statement that Heil-Quaker's commercial activities in Ohio are purely interstate in character. The trial court found that obtaining a license to do business in Ohio is the only procedure by which an out of state corporation in Heil-Quaker's position can appoint an agent for service of process *within* Ohio and thereby satisfy the "Saving clause" as construed by the state's Supreme Court.

The trial court analyzed the "Saving clause" using both a *per se* approach and a balancing test and, under both standards, held it violative of the Commerce Clause as applied to Heil-Quaker. He therefore granted Heil-Quaker's motion to dismiss the complaint against it as barred by Ohio's two year personal injury statute of limitations, without reaching Heil-Quaker's additional contention that the Ohio statutory scheme violates the Due Process Clause. Appellants' contention that the constitutional decision should be applied prospectively only and not in this case, was neither raised in the District Court nor considered by it. The District Court also dismissed on limitations grounds appellants' claims against the other defendants, Sears and Honeywell, and appellants appealed from the dismissal of their claims against Heil-Quaker and Honeywell.

The Court of Appeals set the appeal in this case for argument at the same time and before the same panel as the appeal in its Case No. 85-3784, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, in which the same Commerce Clause question was presented. In fact, the *Bendix* case

had been filed in the same District Court as this case, and was pending at the same time and before the same judge. He permitted the parties in the *Bendix* case to participate in oral argument on Heil-Quaker's motion to dismiss, and released his decision on Heil-Quaker's motion to dismiss simultaneously with his decision on the *Bendix* defendant's motion to dismiss.

The Court of Appeals affirmed the District Court's judgment dismissing appellants' complaint against Heil-Quaker and, for its reasoning on the Commerce Clause issue, simply referred to its decision in the *Bendix* case, now reported at 820 F.2d 186. In *Bendix* the Sixth Circuit agreed with the District Court in all respects—that an out of state corporation having no intrastate contacts with Ohio can satisfy the state's "Saving clause" only by obtaining a license to do business in Ohio, a process which includes appointment of an agent for service, and that the Ohio tolling provision violates the Commerce Clause as applied to corporations in the position of the *Bendix* defendant and Heil-Quaker both under a *per se* approach and using a balancing test in which the burden on commerce is weighed against possible benefits to local interests. The Court of Appeals refused to consider Bendix's argument, raised for the first time in its reply brief on appeal, that the Commerce Clause ruling should be given prospective effect only. 820 F.2d at 189. The appellants in this case did not themselves brief or argue any of the Commerce Clause issues before the Court of Appeals but simply adopted the briefs and argument of Bendix on that question.

ARGUMENT

1. The Sixth Circuit's Commerce Clause Holding Is Correct

G.D. Searle & Company v. Cohn, 455 U.S. 404 (1982), involved a New Jersey tolling statute which, like the Ohio statute in this case, had been construed by the state's highest court to toll limitations whenever the defendant was not amenable to personal service *within* the state, regardless of the availability of "long arm" service.[3] This Court sustained the New Jersey statute under the Equal Protection Clause but withheld adjudication of its validity under the Commerce Clause pending a determination on remand whether, as a matter of state law, a foreign corporation could avoid tolling by any means short of becoming licensed to do business in New Jersey. The *Searle* remand indicated at least a serious question under the Commerce Clause if an out of state corporation could avoid the tolling effect of the New Jersey statute only by becoming licensed to do business there.

On remand *Searle* was stayed by the lower federal courts pending adjudication of the same issue in a case then pending before the courts of New Jersey. In a decision to which appellants refer as "*Coons I*," the Supreme Court of New Jersey held, as a matter of state law, that an out of state corporation could indeed avoid the tolling effect of the New Jersey statute only by becoming licensed to do business within the state; and further held that the

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3. *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *vacated*, 455 U.S. 985 (1982); compare, *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971).

state's tolling statute amounted to a forced licensing provision, *per se* violative of the Commerce Clause. *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A.2d 921 (1983) (*"Coons I"*), *rehearing granted*, 95 N.J. 234, 470 A.2d 446 (1984), *mod. clarified*, 96 N.J. 419, 476 A.2d 763 (1984) (*"Coons II"*), *cert. denied*, 469 U.S. 1123 (1985).

Coons I relied upon a settled line of this Court's decisions, citing *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), which hold that no state may require licensure of persons doing business in other states as a condition of access to the state courts in connection with their interstate businesses. The New Jersey Court in *Coons I* explained (463 A.2d at 927) that a state legislature:

> "cannot accomplish indirectly that which it could not do directly; it cannot in effect force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional."

This straightforward application of settled law was approved and followed by the Sixth Circuit in its own constitutional decision in *Bendix*, 820 F.2d at 188, its vehicle for explaining the decision in this case. It is clearly correct and does not require further consideration.

The Sixth Circuit also approved and adopted the balancing approach under which the trial court had also in-

validated the Ohio "Saving clause" as applied to Heil-Quaker, focusing upon the dilemma faced by the out of state corporation forced to choose between exposing itself to personal jurisdiction in the state courts or remaining liable in perpetuity for all lawsuits containing state causes of action where "long-arm" jurisdiction might successfully be asserted. The courts of Ohio exercise jurisdiction over *all* causes of action asserted against a defendant who is personally served within the state, even when no party is an Ohio resident and Ohio has no connection with the cause asserted. *Perkins v. Benguet Consolidated Mining Co.*, 158 Ohio St. 145 (1952); *Mattone v. Argentina*, 123 Ohio St. 393, 175 N.E. 603 (1931); *The Firestone Tire & Rubber Co. v. State Farm Mutual Automobile Ins. Co.*, 119 Ohio App. 116, 197 N.E.2d 379 (1963). Thus, in order to obtain the benefit of the limitations defense in cases in which Ohio may have a sufficient interest to assert "long-arm" jurisdiction, the scheme of Ohio law requires an out of state corporation like Heil-Quaker to take action which would subject it to the jurisdiction of Ohio's courts in *other* cases, in which Ohio has no interest, and which Due Process Clause would otherwise prohibit Ohio from asserting.

The lower courts in this case had adopted the balancing analysis found in the District Court opinion in *McKinley v. Combustion Engineering, Inc.*, 575 F.Supp. 942 (D. Ida. 1983), *affirmed in part, reversed in part*, 746 F.2d 1486 (mem. unpub.) (9th Cir. 1984). Appellants' discussion of *McKinley* searches wishfully for conflict which does not exist. In *McKinley* the Ninth Circuit *affirmed* the District Court's judgment dismissing the complaint on limitations grounds, rendering its decision by unpublished mem-

orandum,[4] reprinted commencing at page SA 6 of the Supplemental Appendix bound with this motion. It held that the Idaho statute withholding the limitations defense from unlicensed corporations simply does not apply to corporations which lack minimum intrastate contacts with Idaho and therefore posed no impediment to the limitations defense which had been asserted and which was upheld in that case. There is no inconsistency between that decision and the decisions of the lower courts here holding the Ohio statute invalid as applied precisely because it does what the Idaho statute does not—withholds the limitations defense from unlicensed corporations which *do* lack minimum intrastate contacts with the State.

Thus, the Sixth Circuit's balancing approach, like its *per se* analysis, merely constitutes an unremarkable application of well established principles. Plenary review by this Court is unwarranted.

2. The Lower Courts Properly Applied Their Constitutional Holding In This Case

At the outset, the Sixth Circuit refused to entertain the argument for nonretroactive application of the constitutional decision specifically because it was raised for the first time in a reply brief. *Bendix,* 820 F.2d at 189. The Court merely applied a generally established principle of appellate procedure,[5] and plenary review by this Court is unwarranted.

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4. Ninth Circuit Rule 21(c) prohibits citation of such a decision as precedent within that Circuit.

5. *E.g., Beerly v. Department of Treasury,* 768 F.2d 942, 949 (7th Cir. 1985), *cert. denied,* — U.S. —, 89 L.Ed.2d 301 (Feb. 4, 1986); *Knighten v. C.I.R.,* 702 F.2d 59, 60 n.1., *rehearing denied,* 705 F.2d 777 (5th Cir.), *cert. denied,* 464 U.S. 897 (1983); *Thompson v. C.I.R.,* 631 F.2d 642, 649 (9th Cir. 1980), *cert. denied,* 452 U.S. 961 (1981).

Moreover, even if the Sixth Circuit had considered the nonretroactivity argument, it was reviewing a judgment of the District Court before which that argument had not been raised at any time. The District Court hardly abused its discretion by applying in deciding this case the holding which it rendered in this case when it had not been asked by either the plaintiffs in this case (appellants here) or Bendix, the plaintiff in the related case, to do anything else.

Furthermore, even if the request for nonretroactive application had been presented properly to the lower courts, still the judgment dismissing the complaint against Heil-Quaker should be affirmed. The constitutional decision invalidating Ohio's "Saving clause" was rendered by the District Court *in this very case.*[6] The Constitutional "case or controversy" limitation upon the very jurisdiction of the federal courts *required* that the District Court apply in this case the constitutional holding which it rendered in this case, for its decision would otherwise have been a mere advisory opinion. *Stovall v. Denno,* 388 U.S. 293, 301 (1967).[7]

Moreover, earlier this year, this Court reconsidered the doctrine which had permitted new constitutional holdings to be applied prospectively only and not to cases still pending at the time a new holding was announced. In *Griffith v. Kentucky,* 479 U.S. —, 93 L.Ed. 2d 649 (January 13, 1987), the Court held that a new constitutional rule

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6. The District Court's decision was announced in simultaneously released memorandum opinions entered in this case and in the related *Bendix* case.

7. While *Stovall v. Denno* was a criminal case, the principle for which it is cited is equally applicable to civil cases.

for the conduct of a criminal prosecution is to be applied *without* exception to *all* cases not yet final, for several reasons, including the necessity to preserve the integrity of judicial review by resolving pending cases in light of the courts' best understanding of governing constitutional principles. 93 L. Ed. 2d at 658-661. This principle of *Griffith v. Kentucky* is equally applicable to civil cases and requires that this case too be decided in accordance with the courts' best understanding of the governing constitutional principle.

Appellants observe, correctly, that in *Coons II* the Supreme Court of New Jersey directed, as a matter of *state* law, that its *Coons I* decision be applied prospectively only and not even in the case pending before it. Thereafter, the decision of unconstitutionality of the New Jersey statute was applied prospectively only as a matter of *federal* law in *Cohn v. G.D. Searle & Co.*, 784 F.2d 460 (3d Cir.), *cert. denied*, — U.S. —, 93 L.Ed. 2d 248 (Oct. 14, 1986) on remand of the very case in which the Commerce Clause issue had been raised in this Court. The fact that the Third Circuit, acting without the benefit of this Court's decision in *Griffith v. Kentucky*, reached a decision at variance with the principles of that decision, does not require plenary review by this Court of the Sixth Circuit's decision in this case, a decision which is required by the principles of both *Griffith v. Kentucky* and *Stovall v. Denno*, and where the claim for nonretroactivity was not properly raised in either of the lower courts in the first place.

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CONCLUSION

In this case the lower courts applied settled legal principles in an unexceptional manner. The dismissal of the complaint against Heil-Quaker on the ground that it is barred by the two year statute of limitations is clearly correct, poses no question which requires further briefing or argument before this Court, and should now be affirmed.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 86-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

WILLIAM COPLEY; PATSY COPLEY; and DALE COPLEY,

Plaintiffs-Appellants,

v.

HEIL-QUAKER CORPORATION; HONEYWELL, INC.; SEARS, ROEBUCK & COMPANY; PHILLIPS BOTTLED GAS COMPANY; and FREY & SONS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

/

Before: MARTIN, JONES, and MILBURN, Circuit Judges.

PER CURIAM. This case stems from injuries sustained by William Copley when a gas furnace exploded in his home. Copley, his wife, and son appeal the district court's entry of summary judgment for the defendants based on the Copleys' failure to comply with the statute of limitations. We affirm.

In December 1975 Copley awoke to find his furnace inoperative. He went to the basement where he smelled

liquid propane gas and heard a hissing noise. He manually closed the gas valve and attempted to turn on an electric fan to disburse the gas prior to relighting the pilot light. A spark from the fan ignited the gas and Copley was severely burned.

The furnace was manufactured by Heil-Quaker, a Delaware corporation with its principal place of business in Tennessee. The gas valve was manufactured by Honeywell, Inc., a Delaware corporation with its principal place of business in Minnesota.

The Copleys filed a personal injury action Heil-Quaker in federal court in Ohio in August 1982. They filed a common law action for negligence and breach of warranty against Honeywell in federal court in Minnesota in September 1982. Also in September they amended their Ohio complaint to assert a statutory claim against Honeywell, alleging violation of the Consumer Product Safety Commission's reporting rules. The Minnesota cause of action was transferred to Ohio and the cases consolidated. The district court granted summary judgment to both defendants based on its determination that the claims were time-barred.

The statute of limitations for personal injury actions in Ohio is two years. Ohio Rev. Code § 2305.10. The statutory period under Minnesota law for the common law claims is six years for negligence and four years for breach of warranty. Minn. Stat. §§ 541.05(5), 336.2-725. Minnesota law determines the applicable period for these claims because of the general federal rule, as applied in this circuit, that when diversity actions are transferred for the convenience of the parties under 28 U.S.C. § 1404(a), the state law of the transferor court should be applied. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980).

The Copleys filed suit in September 1982, approximately six years and nine months after the December 1975 explosion. They argue that their complaint against Honeywell is timely, however, because the limitations period should be tolled under the doctrine of fraudulent concealment. We find this argument unpersuasive. The doctrine of fraudulent concealment is commonly applied in instances where a defendant by fraud has prevented a plaintiff from learning of his cause of action. *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958). In such cases, the statute of limitations is tolled until the cause of action is discovered or could have been discovered through due diligence. In the current case plaintiffs knew Copley had been injured at the time of the explosion and knew immediately that the source of his injury was the furnace. Shortly after the accident, a plumber told Patsy Copley that in his opinion the explosion was caused by the Honeywell valve. He retained the valve in the event she later needed it. Thus, even assuming that Honeywell did act fraudulently, its conduct did not prevent the Copleys from uncovering material facts necessary to the commencement of their action.

William Copley also argues that the limitations period should be tolled because of his alleged disability as a result of the explosion. However, under Minnesota law a plaintiff's disability

> existing at the time when a cause of action accrued or arising anytime during the period of limitation, shall suspend the running of the period of limitation until the same is removed; provided that such period, except in the case of infancy, shall not be extended for more

> than five years, nor in any case for more than one year after the disability ceases . . . .

Minn. Stat. § 541.15. Thus, William Copley, who was allegedly disabled until March 1980, would have had until March 1981 to file his claim. The claim of his son, who reached majority in December 1976, is also time-barred under the statute.

Further, we find the Copleys' statutory complaint seeking damages for violations of the reporting requirements of the Consumer Product Safety Commission, 15 U.S.C. § 2064(b), to be controlled by the reasoning stated in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986) (failure to comply with the Commission's reporting rules does not give rise to a private cause of action). Accordingly, the claims against Honeywell were properly dismissed by the district court.

With regard to the Copleys' claim against Heil-Quaker, the cause of action for personal injury accrued at the time of the accident. The applicable limitations period is two years. Mrs. Copley's cause of action commenced to run immediately, Mr. Copley's commenced, at the latest on the cessation of his alleged incapacity in March 1980, and Dale Copley's commenced when he reached majority. Thus, even if each is given the benefit of Ohio's disability statute, Ohio Rev. Code § 2305.16, none was timely when filed in September 1982.

Finally, plaintiffs argue that Heil-Quaker should not be permitted to have the benefit of Ohio's statute of limitations unless and until it obtains a license to do business in Ohio. Because we find the application of Ohio's saving clause, Ohio Rev. Code § 2305.15, to be in violation of the

commerce clause of the Constitution, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, No. 85-3784 (6th Cir. May —, 1987), we affirm the decision of the district court dismissing as untimely plaintiffs' claim against Heil-Quaker.

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD DEAN MCKINLEY; ANN MARIE ROWELL; JOHN MICHAEL MCKINLEY; and CAROLYN IRENE HEISE,

Plaintiffs-Appellants,

vs.

COMBUSTION ENGINEERING, INC., and UNIVERSITY OF CHICAGO,

Defendants-Appellees.

No. 84-3505
D.C. No. CIV 80-4045
MEMORANDUM*

Argued and Submitted—September 5, 1984

Decided—October 1, 1984

Appeal from the United States District Court
District of Idaho

Hon. Marion J. Callister, Chief Judge, Presiding

Before: WRIGHT, Senior Circuit Judge, and PREGERSON and CANBY, Circuit Judges.

I. *Background*

This diversity wrongful death action was brought by the heirs of Richard D. McKinley, who was killed in an

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing [*sic*] publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

accident at an experimental nuclear reactor in Idaho Falls in 1961. Eighteen years after the accident, his heirs brought suit against the builder and operator of the experimental reactor, Combustion Engineering. The heirs argue that former Idaho Code § 30-509,[1] (repealed 1979), prevents Combustion Engineering from asserting a statute of limitation defense based on Idaho Code § 5-219 (1979), a two-year statute that governed wrongful death actions.

The district court initially held that § 30-509 did not apply where the defendant foreign corporation could have been served pursuant to Idaho's long-arm statute, Idaho Code § 5-514 (1979). Because § 30-509 did not apply, the district court found that Combustion Engineering was not precluded from asserting a statute of limitations defense. *See* Order Memorandum Decision, *Brackney v. Combustion Engineering, Inc.*, Civ. No. 79-4017 (D. Idaho 1980).[2]

On appeal, another panel of this court declined to decide whether the district court's conclusion regarding

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[1]Former Idaho Code § 30-509 (1967) provides:

> 30-509. *Statute of Limitations.* Every such corporation which fails to comply with the provisions of this chapter [requiring, e.g., filing articles of incorporation with the Secretary of State, designating an agent for service of process] shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.

[2]The Brackneys were the heirs of Richard C. Legg, who was killed in the same explosion as McKinley. The district court held that its decision in the *Brackney* case controlled in the *McKinley* action. The Brackneys later voluntarily dismissed their action.

the interaction of § 30-509 with Idaho's long-arm statute was correct. *Brackney v. Combustion Engineering, Inc.*, 674 F.2d 812, 816 (9th Cir. 1982). We did not indicate any disagreement with district court's construction of Idaho law. Rather, we vacated the portion of the district court's opinion dealing with § 30-509 and remanded for consideration of a threshold issue—whether § 30-509 violated the Commerce Clause. On remand, the district court concluded that § 30-509 imposed an impermissible burden on interstate commerce. *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Idaho 1983).

On this appeal, with apologies to all, we must reverse the district court's holding that former Idaho Code § 30-509 violates the Commerce Clause and reach the issue of Idaho law that was reserved in the original appeal. We agree with the district court's interpretation of Idaho law, and find that § 30-509 does not apply where a defendant foreign corporation could have been served with process under Idaho's long-arm statute.[3]

II. *Standard of Review*

The heirs appeal the district court's decision to dismiss their action under Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) necessarily involves only questions of law and is reviewable *de novo*. *Guillory v.*

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[3]In its Order and Memorandum Decision in *Brackney v. Combustion Engineering, Inc.*, Civ. No. 79-4017 (D. Idaho 1980), the district court gave the McKinley heirs thirty days to file proof that they could not have served Combustion Engineering pursuant to Idaho's long-arm statute. When the heirs failed to make such a showing, the district court found that Combustion Engineering could assert the statute of limitations defense, and dismissed the McKinleys' action as time-barred.

County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *North Star Int'l. v. Arizona, Corp. Comm'n.,* 720 F.2d 578, 580 (9th Cir. 1983). We also review the district court's fidings of state law *de novo. Churchill v. F/V Fjord (In re McLinn),* No. 82-3644 (9th Cir. Aug. 7, 1984) (en banc).

III. *Section 30-509 Does Not Impermissibly Burden Interstate Commerce*

The McKinley heirs argue that by not raising the Commerce Clause issue in the district court in the first instance, Combustion Engineering waived its rights to make the constitutional challenge. The general rule regarding waiver of issues not presented to the district court is flexible enough to allow constitutional issues to be raised initially on appeal. *Krause v. Sacramento Inn,* 479 F.2d 988, 989 (9th Cir. 1973) (general rule that court will not consider constitutional issues raised for first time on appeal is not a jurisdictional limitation but merely a rule of practice). It must be assumed that the previous panel found exceptional circumstances justifying the raising of a constitutional issue *sua sponte* on appeal. Given that the court itself raised the issue, we may not now dispose of the issue by finding that Combustion Engineering waived its constitutional challenge.

Combustion Engineering argues that any state statutes affecting its operations were preempted when Congress enacted the Atomic Energy Act, 42 U.S.C. §§ 2011-2284 (1976 & Supp. V 1981). The Supreme Court has recently held, however, that Congress has not preempted

state law remedies available to those injured in nuclear accidents. *See Silkwood v. Kerr-McGee Corp.*, — U.S. —, 104 S.Ct. 615, 625 (1984). Statutes of limitations are very remote from Congressional regulation concerning the safety of nuclear power plants.

We reverse the district court's conclusion that § 30-509 violates the Commerce Clause for two reasons. First, we find that the burden on interstate commerce is insignificant. Second, we find that the district court was wrong in relying on cases construing a similar New Jersey statute is distinguishable from § 30-509 because it imposed a much greater burden on interstate commerce. We discuss these points in order.

First, we find that as interpreted by Idaho courts, § 30-509 does not significantly burden interstate commerce. The only burden that Combustion Engineering singles out is that § 30-509 requires that foreign corporations waive personal jurisdiction by appointing an agent in order to benefit from Idaho's statute of limitations. This argument fails because Combustion Engineering in particular, and most foreign corporations in general, are not forced to choose between personal jurisdiction and a statute of limitations defense. Idaho state court interpretations of Idaho's statutes dealing with foreign corporations insure that a corporation doing enough business in Idaho to require it to register and appoint an agent will be doing enough business to subject it to personal jurisdiction in Idaho. In order to be subject to the registration requirements, a foreign corporation must be doing a substantial amount of business—more business than it takes to subject the corporation to Idaho's long-arm jurisdiction. *See B.B.P. Assoc., Inc. v. Cessna Air-*

craft Co., 91 Idaho 259, 420 P.2d 134 (1966) (a corporation not doing sufficient local business to subject it to registration requirements could be dong enough business to subject it to long-arm statute personal jurisdiction).

In the instant case, Combustion Engineering was never faced with the choice of waiving personal jurisdiction or giving up its statute of limitations defense. Combustion Engineering had "substantial or continuous and systematic" activities in Idaho. *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). Even if its activities were not classified as continuous and systematic, Combustion Engineering (1) purposely availed itself of the privilege of conducting activities in the forum; (2) the claim arose from forum-related activities; and (3) exercise of jurisdiction seems reasonable. *Data Disc*, 557 F.2d at 1287. Thus, Combustion Engineering was not forced to give up a valid personal jurisdiction defense in order to protect its right to use Idaho's statute of limitations.

In short, we find that § 30-509 imposes no significant burden on interstate commerce.

Second, we conclude that the district court relied too heavily on cases construing a similar New Jersey statute. In *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), the Supreme Court considered an equal protection challenge to a New Jersey statute similar to § 30-509 because the New Jersey statute also required foreign corporations to register or lose their statute of limitations defenses. The Supreme Court did not decide the Commerce Clause issue because it had not been passed on by the District and Circuit Courts, but Justice Powell and Chief Justice Burger,

in a concurrence, characterized the Commerce Clause challenge as having "considerable force." *Id.* at 420 (Burger, C.J., and Powell, J., concurring in part and dissenting in part). After the Supreme Court's decision, the New Jersey Supreme Court found in *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) that the New Jersey statute violated the Commerce Clause. The New Jersey Supreme Court's finding of unconstitutionality was based on the fact that the New Jersey statute sought to impose licensing on foreign corporations dealing *exclusively* in interstate commerce, a practice long held invalid. *See, e.g., Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20 (1974); *International Text-Book Co. v. Pigg*, 217 U.S. 91 (1910). The Idaho statute, by contrast, was construed long ago by the Idaho Supreme Court to apply only to corporations doing significant intrastate business. *See Belle City Mfg. Co. v. Frizzell*, 11 Idaho 1, 81 P. 58 (1905).

Furthermore, because the New Jersey statute applied to corporations engaged solely in interstate commerce, it forced foreign corporations without minimum contacts in New Jersey to choose between appointing an agent for service or losing a statute of limitations defense. As we noted above, this is not true of the Idaho statute; when a corporation does enough intrastate business to require it to register, it will *a fortiori* have enough minimum contacts to be subjected to personal jurisdiction.

In short, we believe the New Jersey statute is distinguishable, and the district court erred in concluding that § 30-509 imposed an impermissible burden on interstate commerce.

IV. *Section 30-509 Does Not Apply*

Having resolved the "threshold issue" by finding § 30-509 constitutional, we now review the district court's original finding that § 30-509 does not apply to the facts of this case. We affirm the district court. The district court found that the purpose of § 30-509 was to protect Idaho plaintiffs who could not easily serve in Idaho foreign corporations that had not registered or designated an agent for service in Idaho. The statute, in essence, tolls the statute of limitations during the period when service is difficult or impossible to effectuate, and allows the statute to run when service is possible due to the presence of an agent in Idaho. With the advent of Idaho's long-arm statute, Idaho Code § 5-514, which makes foreign corporations amenable to service whether they have an agent for service in the state or not, § 30-509's scope was considerably narrowed. After the enactment of § 5-514, § 30-509 applied only where plaintiffs could show that it was impossible to serve the foreign corporation via the long-arm statute.

The district court's construction is supported by an Idaho Supreme Court decision construing an analogous tolling provision in light of Idaho's long-arm statute. In *Lipe v. Javelin Tire Co., Inc.*, 96 Idaho 723, 536 P.2d 291 (1975), the Idaho Supreme Court interpreted Idaho Code § 5-229 (1979), which tolls the statute of limitations while a defendant is absent from the state. *Lipe* also involved a foreign corporation that had not qualified to do business in Idaho, but the plaintiffs in that case apparently relied on § 5-229, and overlooked § 30-509. The court held that the statute of limitations was not tolled even though Javelin Tire was arguably absent from the state, because

Javelin Tire could have been served under the long-arm statute. The court said

> We believe the purpose of I.C. § 5-229 was to prevent the running of the statute of limitations during the time that a defendant was unavailable for service of process because he was absent from the state, and we construe it with that purpose in mind. We now adopt what we believe the more reasonable interpretation of these statutes. Excepting circumstances where the foreign corporation cannot be located for service of process with reasonably diligent efforts, the statute of limitations has not tolled against a foreign corporation which has not qualified to do business within the state during any period of time in which the corporation is subject to the jurisdiction of the courts of this state and may be personally served without the boundaries of this state under the long arm statute.

536 P. 2d at 294. We believe the district court's reasoning and its application of the *Lipe* decision are correct. Thus, § 30-509 is inapplicable to this case, and Combustion Engineering is free to assert the statute of limitations defense.

V. *Conclusion*

The district court originally concluded that the McKinley heirs' claims were barred by the applicable statute of limitations unless Combustion Engineering was precluded from raising the statute of limitations defense by § 30-509. Because § 30-509 is inapplicable, the heirs' claims are barred.

REVERSED IN PART. AFFIRMED IN PART. EACH PARTY TO BEAR ITS OWN COSTS.